Capital Defense Journal

Volume 11 | Issue 2 Article 22

Spring 3-1-1999

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I. Facts

Earl Conrad Bramblett ("Bramblett") was found guilty of capital murder and sentenced to death for the murders of four people, including two children in the town of Vinton, in Roanoke County.[1] The victims were found on Monday, August 29, 1994 by firefighters and police who responded to a house fire, which, it was later determined, was purposely set.[2] In the downstairs living room, they found the body of Teresa Lynn Fulcher Hodges who had been strangled, doused with gasoline, and set on fire.[3] Her husband and children were in upstairs bedrooms and all three had died from gunshots to the head.[4] The two girls, Winter Ashley Hodges, age eleven, and Anah Michelle Hodges, age three, were found in the same bed, and Anah's body was covered with soot and had sustained minor burns.[5] The father had been killed many hours before the rest of his family, probably the afternoon before the female victims were killed.[6]

Ninety-eight witnesses testified during the trial, only four of whom were called by defense during the guilt phase.[7] The Commonwealth's evidence was of three general types: lay witnesses who testified about events surrounding the crime, including the relationship between Bramblett and the Hodges; DNA and weapons evidence; and a convicted felon who had been incarcerated with Bramblett and claimed that Bramblett related the events of the crime to him.

Bramblett had been a good friend of the Hodges family for years, and he was seen at their house and in a nearby national forest with the mother and daughters the day before the crime was discovered.[8] Several friends of the Hodges had contacted or tried to contact them the day before the bodies

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1. Bramblett v. Commonwealth, Nos. 981394, 981395, 1999 WL 101069, at *1 (Va. Feb. 26, 1999).
2. *Id.*, at *5.
3. *Id.*, at *1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*, at *1-2.
8. *Id.*, at *3.

were found.[9] Blaine Hodges spoke by phone with a friend around 5:00 p.m. on Saturday, but later attempts to reach him were unsuccessful.[10] Several sets of witnesses who stopped by the house on Sunday evening and the person who discovered and reported the fire early Monday morning, saw notes on the doors left by Theresa Hodges for Blaine Hodges.[11] Another witness spotted a truck that resembled Bramblett's leaving the Hodges' house at 4:30 Monday morning, just before the fire was reported.[12]

Bramblett showed up at his workplace at 5:08 a.m., which was 4.7 miles from the Hodges' house, about a twelve- minute drive at that early hour.[13] At 5:00 p.m. that same day, Bramblett went to the Vinton police station because the police wanted to ask him about his friendship with the Hodges.[14] During this initial interview, Bramblett became upset and asked if he was going to be charged with murder.[15] Two days later, the police went to a motel room where Bramblett was staying and he again became very upset and said that he had thought about suicide.[16] He agreed to return to the police station at noon that day, but never showed up.[17] The police, "concern[ed] about his safety," went to his motel room and had the owner of the motel open Bramblett's door when he did not respond to their knocks.[18] While the officers were standing in the doorway, Bramblett arrived in a taxi and spoke with the officers briefly.[19] Later that day, two of Blaine Hodges's brothers went to the room to talk to Bramblett, one of whom wore a wire at the urging of the police.[20] The following day, the police got a warrant and searched the room.[21] Two days after the police spoke with him, Bramblett showed up at his sister's home in Indiana, where he told her about the deaths of the Hodges and the subsequent police questioning, but he left abruptly after staying only a few hours.[22] Bramblett was arrested in Spartanburg, South Carolina on July 30, 1996, and waived extradition.[23]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*, at *1, *3.
13. *Id.*, at *3.
14. *Id.*, at *5.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*, at *8.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*, at *7.
23. *Id.*, at *1.

At the trial, a firearms expert testified that the bullets recovered from the bodies had all been fired from the same gun and that a cartridge found at the crime scene matched one found in the defendant's truck.[24] A forensics expert for the Commonwealth also claimed that bullets found at the scene were of identical composition as a bullet that was found in a storage room rented by Bramblett.[25] Also, DNA tests matched a pubic hair found on the children's bed to Bramblett's pubic hair.[26]

II. Holding

The Virginia Supreme Court decided that the trial court committed no reversible error and that Bramblett's death sentence was proper.[27]

III. Analysis / Application in Virginia [28]

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24. *Id.*, at *4.

25. *Id.*

26. *Id.*

27. *Id.*, at *11.

28. Several issues, though raised by Bramblett and addressed by the court, will not be discussed in detail in this case note. Some turned on facts particular to the case; others were dismissed in a summary fashion. These include:

(1) Change of venue. Bramblett based his argument on the fact that there was extensive media coverage of the crimes and his capture. The court took his motion under advisement, but denied it after jury selection ended. The Virginia Supreme Court took into consideration "the ease with which the jury was selected." *Bramblett*, 1999 WL 101069, at *5.

(2) Competency. Three psychologists evaluated Bramblett and each had a slightly different opinion as to his competency to stand trial. The first psychologist was concerned about Bramblett's competency and asked the court to have someone else evaluate him. Two other psychologists were eventually appointed, and both diagnosed Bramblett as having a delusional disorder of the persecutory type. However, they both declared their belief that Bramblett was competent. *Bramblett*, 1999 WL 101069, at *6.

(3) Motions to suppress. This court considered the following two of Bramblett's motions to suppress: (i) evidence gained during the search of his motel room; and (ii) a box of audio tapes and pictures of the Hodges children that were in the possession of his sister. Regarding the motel search, Bramblett did not challenge the search with the warrant, but only the first search when the police officers had the door opened. The court denied the motion because no evidence was seized at that time, holding that there was no search. The other motion was more complicated. About a year before the murders, Bramblett mailed two boxes to his sister, telling her to hold them for him and that she could have them in case anything happened to him. After he showed up at her house and told her about the police investigation, the sister contacted the local sheriff and consented to let him search the containers. Inside, there were pictures of the Hodges' children and sixty-two audio tapes on which "Bramblett expressed a sexual interest in Winter Hodges and his belief that the child's parents were trying to 'set him up' or entrap him in a sexual act with her.'" *Bramblett*, 1999 WL 101069, at *4, *7. Bramblett argued that the police needed a warrant to open the boxes because his sister did not have authority to consent to a search. The court wrote, "[t]he sister had boxes addressed to her in her exclusive possession. Bramblett imposed no restrictions with respect to the contents. Thus, he had no remaining expectation of privacy in the items. The Fourth Amendment does not restrict the authority of the police to accept evidence

A. Defense Experts

A critical part of the evidence against Bramblett was compiled and explained at trial by the Commonwealth's experts. The Virginia Supreme Court mentioned at least four types of evidence that requires expert preparation: forensics, ballistics, DNA, and video reenactment.[29] The other witnesses, with the exception of the jailhouse informant, did not play a large role in the police investigation and the Commonwealth's case at trial, since it was common for Bramblett to be seen with the Hodges and no one placed him directly at the crime scene at the time of the offense.

When expert testimony plays such a large role in the Commonwealth's case, the court has a responsibility to grant the defendant's request for his

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volunteered by private citizens." *Id.*, at *7 (citing Ritter v. Commonwealth, 173 S.E.2d 799, 804 (Va. 1970)). The court offered little explanation and only one case to support its assertion that Bramblett had "no remaining expectation of privacy" in the packages. The court acknowledged that he told his sister "to keep the boxes for him," and it did not address the fact that the sister apparently thought they were not hers to open. *Id.*, at *7.

(4) Vagueness of aggravating factors. Bramblett claimed that "the statute dealing with the capital sentencing proceeding is unconstitutional because the aggravating factors 'are vague and do not adequately channel the discretion of the jury.'" *Bramblett*, 1999 WL 101069, at *2 (quoting Smith v. Commonwealth, 248 S.E.2d 135, 146-49 (Va. 1978)). The court noted that it had rejected this argument in prior cases and would not discuss it. *Id.*, at *2 (citing *Smith*, 248 S.E.2d at 146-149).

(5) Sufficiency of evidence for conviction. The court declared that the evidence used to convict was "overwhelming" and reviewed pieces of evidence not already considered thus far in the opinion. *Bramblett*, 1999 WL 101069, at *9-10.

(6) Sufficiency of aggravating evidence at penalty phase. The court decided that future dangerousness was amply shown by Bramblett's "conduct with 11-year-old [sic] Winter Hodges as well as his extensive and long-term planning and execution of the murders." *Bramblett*, 1999 WL 101069, at *10.

(7) The jury was misinformed about his prior record. Bramblett claimed that "'all of the factors used by the Commonwealth to enhance punishment concern events that occurred two decades before the current offenses,'" but the court responded that "[t]he time gap of decades affected only the weight to be accorded the evidence, not its admissibility." *Bramblett*, 1999 WL 101069, at *10 (quoting George v. Commonwealth, 411 S.E.2d 12, 18 (Va. 1991)).

(8) Proportionality review. The court found that Bramblett's sentence was not disproportionate because he was found guilty of "the senseless murder of a young child," and he was "convicted of killing other persons." *Bramblett*, 1999 WL 101069, at *11.

(9) Bramblett also raised a claim of prosecutorial misconduct that should be noted, though the court found it to be defaulted. The defense claimed that "the prosecutor withheld evidence in violation of court orders and asked questions during the trial 'which he knew were objectionable.'" *Bramblett*, 1999 WL 101069, at *2. The court held that the claim was defaulted "because defendant did not ask the trial court to dismiss the indictments on the foregoing grounds." *Id.* (citing VA. SUP. CT. R. 5:25). It is unclear whether the evolving default doctrine of the Supreme Court of Virginia now requires that a particular remedy be sought in order to preserve a claim.

29. The video was a reenactment of Bramblett's truck leaving the Hodges' house with the street lights as illumination.

own experts under *Ake v. Oklahoma*[30] and *Husske v. Commonwealth*.[31] The *Ake* court recognized that a trial may be fundamentally unfair if one side is left without expert assistance.[32] The test in Virginia is set forth in *Husske*: "an indigent defendant who seeks the appointment of an expert, at the Commonwealth's expense, must show a particularized need for such services and that he will be prejudiced by the lack of expert assistance."[33]

Although *Ake* dealt with only psychiatric experts, its reasoning and holding has been extended to a variety of expert witnesses. The Virginia Supreme Court recognized this expansion in *Husske*, stating, "[w]e are of the opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and that in certain instances, these basic tools may include the appointment of non-psychiatric experts."[34] The court qualified this assertion by stating that the "Due Process requirement, however, does not confer a right upon an indigent defendant to receive, at the Commonwealth's expense, all assistance that a non-indigent defendant may purchase" and that the defendant must take care to show that appointment of an expert is necessary and important to the defense.[35]

In cases such as Bramblett's, where the Commonwealth has a legion of experts, such a need may very well have been shown. When making a motion to receive funding and appointment of an expert witness, defense counsel must be careful and make more than a generalized statement of why an expert is needed.[36] Additionally, counsel should keep in mind that there are experts in a variety of areas, not just psychiatrists and DNA experts. A recent publication of the Habeas Assistance and Training Counsel, entitled "Summaries of Successful Cases Under *Ake v. Oklahoma* or Analogous to *Ake*," provides summaries of successful *Ake* claims in a variety of areas, from pediatricians to hypnotists. Defense attorneys may contact the Virginia Capital Case Clearinghouse for a copy of this important document.

B. Jailhouse Confession

Another important piece of evidence presented by the Commonwealth was the testimony of Tracy Turner ("Turner"), a convicted felon who was

30. 470 U.S. 68, 91 (1985).

31. 476 S.E.2d 920, 930 (Va. 1996).

32. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

33. Husske v. Commonwealth, 476 S.E.2d 920, 926 (Va. 1996).

34. *Id.* at 924 (quoting *Ake*, 470 U.S. at 77; citing Caldwell v. Mississippi, 472 U.S. 320 (1985)).

35. *Id.*

36. *Id.* at 926. (In *Husske*, the Virginia Supreme Court found that the defendant had made a generalized statement and failed to show a particular need or any prejudice he experienced because he lacked an expert.).

incarcerated with Bramblett and who claimed that Bramblett confessed to the murders. This jailhouse informant claimed that he and Bramblett discussed Bramblett's addiction to young girls and that Teresa Hodges had caught Bramblett with one of her daughters.[37] He also related that Bramblett believed that burning a house would effectively destroy evidence and that Bramblett planned to make the murders look like a drug hit.[38]

The prosecution had planned to use Turner's testimony for rebuttal, but decided to use it in its case-in-chief after prosecutors suspected that the defense knew of their plans. The prosecution made this decision on the Thursday or Friday, and Turner testified the following Wednesday; on Wednesday, the prosecution disclosed Turner's name and criminal record to defense.[39] The defense moved to bar Turner's testimony on the grounds that it did not have enough time to investigate Turner, and that the "prosecutor's failure to disclose Turner's criminal history violated the court's prior discovery orders and due process."[40] The trial court denied the motion, but offered to allow the defense to postpone the cross-examination in order to investigate further.[41] After the testimony, the defense moved for either a mistrial or for the court to instruct the jury to disregard the testimony.[42] Again, the motions were denied, and, on direct review, the Virginia Supreme Court found no error in this denial.[43] The court found that "five or six days" was enough time to investigate, that the defendant did not accept the trial court's offer to delay cross-examination, and that the defendant did not demonstrate any specific prejudice from the delay in disclosure.[44] It held that "[i]f exculpatory evidence is obtained in time for it to be used effectively by the defendant, and there is no showing that an accused has been prejudiced, there is no due process violation."[45]

The *Bramblett* decision acknowledged the right of defendants to receive information about the informant that the Commonwealth plans to use at trial. The court stated, "[o]f course, [the] defendant was entitled to disclosure of exculpatory evidence, including evidence that impeaches the credibility of a prosecution witness, under *Brady v. Maryland*."[46] However, while the trial court and the Virginia Supreme Court only considered disclosure

37. *Bramblett*, 1999 WL 101069, at *4.

38. *Id.*

39. *Id.*, at *8.

40. *Id.*, at *9.

41. *Id.*, at *8.

42. *Id.*, at *9.

43. Although the court does not mention it, defense counsel raised this issue very forcefully.

44. *Bramblett*, 1999 WL 101069, at *9.

45. *Id.*, at *9.

46. *Id.* (citing Robinson v. Commonwealth, 341 S.E.2d 159, 164 (Va. 1986); Brady v. Maryland, 373 U.S. 83 (1963)).

of the informant's criminal record, the law provides that far more material be disclosed by the Commonwealth. Indeed, the *Bramblett* court acknowledged this also.[47] In addition to the criminal record, defense counsel should request, possibly using the language of *Bramblett*, the circumstances surrounding the alleged statements, other witnesses from the jail, any contact the informant may have had with a representative from the prosecution, the existence of promises or threats made to the informant by the Commonwealth's attorneys, and any prior acts or statements that may affect the informant's credibility. All of these pieces of information fall under *Brady* and should be turned over if defense counsel requests them.

Robert H. Robinson, Jr.

47. *Id.*